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Listing and Delisting Processes Under the  
Endangered Species Act: Hearing Before the S.  
Subcomm. on Fisheries, Wildlife and Water, 107th  
Cong., May 9, 2001 (Statement of John D.  
Echeverria, Dir. Environmental Policy Project, Geo.  
U. L. Center)

John D. Echeverria  
*Georgetown University Law Center*

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# LISTING AND DELISTING PROCESSES UNDER THE ENDANGERED SPECIES ACT

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## HEARING

BEFORE THE  
SUBCOMMITTEE ON FISHERIES, WILDLIFE,  
AND WATER  
OF THE  
COMMITTEE ON  
ENVIRONMENT AND PUBLIC WORKS  
UNITED STATES SENATE  
ONE HUNDRED SEVENTH CONGRESS  
FIRST SESSION

ON

THE REGULATIONS AND PROCEDURES OF THE U.S. FISH AND WILD-  
LIFE SERVICE CONCERNING THE LISTING AND DELISTING OF SPE-  
CIES UNDER THE ENDANGERED SPECIES ACT

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MAY 9, 2001

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rector of Government Affairs at Seaboard Corporation, and Mr. Zeke Grader, executive director of the Pacific Coast Federation of Fishermen's Associations.

Gentleman, we appreciate your being with us and we will proceed in the order that I read your names, which will be from your right across the table. Again, I would like to remind you as well to try to remember to watch the lights here, so that we can have an opportunity for discussion.

Mr. Echeverria.

**STATEMENT OF JOHN ECHEVERRIA, DIRECTOR, ENVIRONMENTAL POLICY PROJECT, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC**

Mr. ECHEVERRIA. Thank you, Mr. Chairman. My name is John Echeverria, and I'm the director of the Environmental Policy Project at Georgetown University Law Center in Washington, DC, where I am also an adjunct professor. I appreciate the opportunity to be here.

My written testimony addresses a number of issues, and I would be happy to discuss those. But I thought in my brief oral testimony I would focus on the issue of citizen suits.

The Administration's recent budget submission to Congress includes a proposal that would prevent citizens from continuing to go to Federal court to enforce deadlines in section 4 of the ESA for the listing of threatened and endangered species and for the designation of critical habitat. In my view this proposal is unwise for two reasons. First, it would destroy one of Congress' most valuable tools for ensuring that Federal agencies comply with the ESA as Congress intended. Second, it fails to address the most obvious solution to the growing volume of ESA lawsuits being filed against the agencies.

As an attorney, I acknowledge that lawyers and lawsuits are at best a necessary evil. In an ideal world there would be little or none of either one of them. Unfortunately, this is not an ideal world, and I think we all recognize that lawyers and lawsuits are necessary for a variety of purposes, including the vindication of public and private rights. And I'm sure, whatever else Mr. Quarles has to say, that he will agree with me on that.

The legislative history of the ESA makes clear that Congress included a specific provision authorizing citizen suits for a very sensible reason. As the committee is aware, Congress has the opportunity to act on major legislation such as the ESA on a relatively infrequent basis. Therefore, an obvious concern for Congress has been what steps the agencies will take or will not take to implement the law during the long periods when Congress is focusing on other issues. Unfortunately, experience has shown that coalitions of regulated businesses tend to exert enormous influence by lobbying the agencies to delay implementation of the law or to adopt strained interpretations of the law that will lessen their regulatory burdens. These efforts are countered to a limited degree at least by environmental advocates who attempt to speak on behalf of the broad public interest protected by the law. Unfortunately, concentrated wealth and power frequently prevail over the broad public interest in this process. Academics talk about this phenomenon

using fancy terms like the collective action problem and agency capture. Most citizens simply understand that money talks.

Citizen suits provide Congress a solution to this problem. By empowering individual groups and citizens to directly enforce the law as Congress has written it, Congress creates an important check on the agencies' ability to subvert Congress' will. The goal is not, as some have suggested, to set up the courts as the arbiters of environmental disputes or to assign citizen groups around the country some special policymaking responsibility. Instead, the goal is simply to use our established judicial procedures to see that Congress' will is carried out. In many cases the mere threat of successful litigation can prevent an agency from flouting the will of Congress and avoid the need for actual litigation.

Mr. Chairman, you asked the question, why is there so much litigation? The obvious answer is the enormous backlog of species listings and habitat designations that need to be carried out according to the standards and schedules that Congress included in the Endangered Species Act.

There has been a lot of criticism of litigation as a serious problem. But it seems to me that describing ESA litigation as a problem is a little bit like blaming the canary in the coal mine for chirping a little too loudly. The volume of litigation in this country over the ESA is, in my judgment, less a problem than a symptom of a problem.

I also want to observe that with respect to the Administration's proposal it is fair to observe that we have already been there and done that, so to speak. Prior to 1982, the Endangered Species Act did not have the kinds of specific enforceable deadlines that it has today. Under the earlier regime the agencies got very little done. As the legislative history of the 1982 amendments to the ESA reflects, Congress included enforceable deadlines in order to move the agencies along.

Finally, I would simply observe that, if the Administration's objective is to avoid unnecessary litigation rather than to gut the ESA, a ready solution is at hand: increased appropriations to address the backlog of ESA listings and habitat designations.

I understand that the U.S. Fish and Wildlife Service has estimated that a relatively modest \$120 million over a period of years would eliminate the backlog and thereby eliminate the basis for many of the suits being filed. As compared to eviscerating the citizens' suit provision, increased funding levels will allow Congress to reduce the volume of litigation against the agencies while simultaneously preserving an important tool to prevent agencies from ignoring congressional mandates.

Thank you, and I will be happy to respond to any questions.

Senator CRAPO. Thank you very much. And it is "Echeverria"?

Mr. ECHEVERRIA. Echeverria.

Senator CRAPO. I'll get it right. I'm sorry.

Mr. Quarles.